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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 18, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRETT N.,¹

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY ADMINISTRATION,
Defendant.

No. 4:22-CV-05136-SAB

**ORDER REVERSING DECISION OF
COMMISSIONER**

Plaintiff brings this action seeking judicial review of the Commissioner of Social Security's final decision denying his application for social security benefits. Plaintiff is represented by Chad L. Hatfield. The Commissioner is represented by Timothy R. Bolin and Brian M. Donovan. Pending before the Court are Plaintiff's Opening Brief, ECF No. 11, the Commissioner's Brief, ECF No. 13, and Plaintiff's Reply Brief, ECF No. 14.

After reviewing the administrative record, briefs filed by the parties, and applicable case law, the Court is fully informed. For the reasons set forth below, the Court reverses the Commissioner's decision.

¹ Pursuant to the recommendation of the Committee on Court Administration and Case Management of the Judicial Conference of the United States, Plaintiff's name is partially redacted.

ORDER REVERSING DECISION OF COMMISSIONER *1

1 **I. Jurisdiction**

2 On July 31, 2019, Plaintiff filed an application for Title II disability insurance
 3 benefits, with the onset date of November 1, 2015. Plaintiff's application was denied
 4 initially and on reconsideration. Plaintiff requested a hearing. On September 21,
 5 2021, a telephonic hearing was held. Plaintiff appeared and testified before an ALJ,
 6 with the assistance of his counsel. A Vocational Expert (VE) also participated. The
 7 ALJ found that Plaintiff was not disabled.

8 Plaintiff requested review by the Appeals Council, and the Appeals Council
 9 denied the request on September 6, 2022. The Appeals Council's denial of review
 10 makes the ALJ's decision the "final decision" of the Commissioner of Social
 11 Security, which this Court is permitted to review. 42 U.S.C. § 405(g), 1383(c)(1)(3).
 12 Plaintiff filed a timely appeal on November 10, 2022. ECF No. 1. The matter is
 13 before this Court pursuant to 42 U.S.C. § 405(g).

14 **II. Five-Step Sequential Evaluation Process**

15 The Social Security Act defines disability as the "inability to engage in any
 16 substantial gainful activity by reason of any medically determinable physical or
 17 mental impairment which can be expected to result in death or which has lasted or
 18 can be expected to last for a continuous period of not less than twelve months." 42
 19 U.S.C. § 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be under
 20 a disability only if their impairments are of such severity that the claimant is not only
 21 unable to do their previous work, but cannot, considering claimant's age, education,
 22 and work experiences, engage in any other substantial gainful work that exists in the
 23 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The Commissioner
 24 has established a five-step sequential evaluation process to determine whether a
 25 person is disabled in the statute. *See* 20 C.F.R. § 404.1520(a)(4)(i)–(v),
 26 416.920(a)(4)(i)–(v).

27 **Step One:** Is the claimant engaged in substantial gainful activities? *Id.*
 28 § 404.1520(a)(4)(i), 416.920(a)(4)(i). Substantial gainful activity is work done for

1 pay and requires compensation above the statutory minimum. *Keyes v. Sullivan*, 894
2 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in substantial activity,
3 benefits are denied. *Id.* § 404.1520(b), 416.920(b). If the claimant is not, the ALJ
4 proceeds to step two.

5 **Step Two:** Does the claimant have a medically-severe impairment or
6 combination of impairments? *Id.* § 404.1520(a)(4)(ii), 416.920(a)(4)(ii). A severe
7 impairment is one that lasted or must be expected to last for at least 12 months and
8 must be proven through objective medical evidence. *Id.* §§ 404.1509, 416.909. If the
9 claimant does not have a severe impairment or combination of impairments, the
10 disability claim is denied. *Id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
11 impairment is severe, the evaluation proceeds to the third step.

12 **Step Three:** Does the claimant's impairment meet or equal one of the listed
13 impairments acknowledged by the Commissioner to be so severe as to preclude
14 substantial gainful activity? *Id.* § 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the
15 impairment meets or equals one of the listed impairments, the claimant is
16 conclusively presumed to be disabled. *Id.* § 404.1520(d), 416.920(d). If the
17 impairment is not one conclusively presumed to be disabling, the evaluation
18 proceeds to the fourth step.

19 Before proceeding to the fourth step, the ALJ must first determine the
20 claimant's residual functional capacity (RFC). An individual's residual functional
21 capacity is their ability to do physical and mental work activities on a sustained basis
22 despite limitations from their impairments. *Id.* § 404.1545(a)(1), 416.945(a)(1). The
23 RFC is relevant to both the fourth and fifth steps of the analysis.

24 **Step Four:** Does the impairment prevent the claimant from performing work
25 they have performed in the past? *Id.* § 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
26 claimant is able to perform their previous work, they are not disabled. *Id.*
27 § 404.1520(f), 416.920(f). If the claimant cannot perform this work, the evaluation
28 proceeds to the fifth and final step.

1 **Step Five:** Is the claimant able to perform other work in the national economy
 2 in view of their age, education, and work experience? *Id.* § 404.1520(a)(4)(v),
 3 416.920(a)(4)(v). The initial burden of proof rests upon the claimant to establish a
 4 *prima facie* case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094,
 5 1098 (9th Cir. 1999). This burden is met once a claimant establishes that a physical
 6 or mental impairment prevents him from engaging in her previous occupation. *Id.*
 7 At step five, the burden shifts to the Commissioner to show that the claimant can
 8 perform other substantial gainful activity. *Id.*

9 **III. Standard of Review**

10 The Commissioner's determination will be set aside only when the ALJ's
 11 findings are based on legal error or are not supported by substantial evidence in the
 12 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing
 13 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
 14 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance,"
 15 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial
 16 evidence is "such relevant evidence as a reasonable mind might accept as adequate
 17 to support a conclusion." *Richardson*, 402 U.S. at 401.

18 A decision supported by substantial evidence will be set aside if the proper
 19 legal standards were not applied in weighing the evidence and making the decision.
 20 *Brawner v. Secr'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988). An
 21 ALJ is allowed "inconsequential" errors as long as they are immaterial to the
 22 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d
 23 1050, 1055 (9th Cir. 2006). The court must uphold the ALJ's denial of benefits if
 24 the evidence is susceptible to more than one rational interpretation, one of which
 25 supports the decision of the administrative law judge. *Batson v. Barnhart*, 359 F.3d
 26 1190, 1193 (9th Cir. 2004). It "must consider the entire record as a whole, weighing
 27 both the evidence that supports and the evidence that detracts from the
 28 Commissioner's conclusion, and may not affirm simply by isolating a specific

1 quantum of supporting evidence.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir.
 2 2017) (quotation omitted). “If the evidence can support either outcome, the court
 3 may not substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019.

4 **IV. Statement of Facts**

5 The facts have been presented in the administrative record, the ALJ’s
 6 decision, and the briefs to this Court. Only the most relevant facts are summarized
 7 here.

8 Plaintiff was born on August 17, 1970. He graduated from high school and
 9 earned a two-year degree in criminal justice. Plaintiff last worked as a driver in 2012,
 10 a screen printer in 2010, and in loss prevention from 1997 to 2008. He alleges
 11 disabilities, as of November 1, 2015, based on the following conditions:
 12 schwannoma tumor on C5 nerve, neck and lower back arthritis, compressed disks,
 13 and anxiety. He claims his disabilities affect his ability to lift, squat, bend, stand,
 14 reach, walk, sit, kneel, climb stairs, complete tasks, and use his hands.

15 Plaintiff reports that he is unable to stand or sit for periods of time, turn his
 16 head all the way to the right, and experiences dizzy spells and shakiness in his right
 17 hand. Plaintiff’s daily activities include making breakfast, showering, painting, and
 18 doing dishes, stretches, and laundry. He claims he can perform most of these
 19 activities in 10-to-15-minute intervals, typically until his right hand starts shaking,
 20 and must recline at an angle for approximately 20 minutes to relieve pressure.
 21 Plaintiff also reports that his anxiety keeps him awake, causes panic attacks, and
 22 prevents him from being in large groups of people.

23 **V. The ALJ’s Findings**

24 The ALJ issued an opinion affirming denial of benefits. AR 18–29. At step
 25 one, the ALJ found that Plaintiff has not engaged in substantial gainful activity since
 26 July 31, 2019, the application date. AR 20.

27 At step two, the ALJ identified the following severe impairments: spinal
 28 schwannoma, amblyopia, right eye, mood disorder, and generalized anxiety

1 disorder. *Id.*

2 At step three, the ALJ found that Plaintiff did not have an impairment or
3 combination of impairments that meets or medically equals the severity of one of
4 the listed impairments. AR 21.

5 At step four, the ALJ concluded that Plaintiff has an RFC to perform:

6 a full range of medium work as defined in 20 CFR 416.967(c) with the
7 following exceptions: he can frequently reach overhead; he can only
8 rotate his neck 45 degrees from neutral; he cannot perform tasks
9 requiring precise depth perception, such as threading a needle or using
10 dangerous tools; he can have no contact with the public; he can have
11 frequent contact with coworkers and supervisors; he needs a routine,
predictable work environment with no more than occasional, simple
changes; and he will be off task 5-7% of the workday.

12 AR 22.

13 At step five, the ALJ found that Plaintiff was not capable of performing past
14 relevant work as a shuttle van driver, loss prevention worker, or screen printer.
15 AR 27.

16 The ALJ found there were other jobs that existed in significant numbers in the
17 national economy that Plaintiff could also perform in the national economy,
18 specifically collator operator, garment sorter, and routing clerk. Consequently, the
19 ALJ found that Plaintiff was not disabled.

20 VI. Issues

- 21 1. Whether the ALJ erred in improperly evaluating the medical opinion
evidence.
- 22 2. Whether the ALJ erred in rejecting Plaintiff's subjective complaints.
- 23 3. Whether the ALJ erred in rejecting lay witness testimony.
- 24 4. Whether the ALJ met their Step Five burden.

25 VII. Discussion

26 A. Evaluation of the Medical Opinions

27 Plaintiff argues the ALJ improperly evaluated the medical opinion evidence

1 of three providers: (1) Meneleo T. Lilagan, M.D.; (2) David T. Morgan, Ph.D.; and
2 (3) Jani Lewis, PhD.

3 In evaluating medical opinion evidence, the ALJ considers the persuasiveness
4 of each medical opinion and prior administrative medical finding from medical
5 sources. 20 C.F.R. § 416.920c(a), (b). The ALJ is required to consider multiple
6 factors, including supportability, consistency, the source's relationship with the
7 claimant, any specialization of the source, and other factors (such as the source's
8 familiarity with other evidence in the file or an understanding of Social Security's
9 disability program). *Id.* § 416.920c(c)(1)–(5). Supportability and consistency of an
10 opinion are the most important factors, and the ALJ must articulate how they
11 considered those factors in determining the persuasiveness of each medical opinion
12 or prior administrative medical finding. *Id.* § 416.920c(b)(2). The ALJ may explain
13 how they considered the other factors, but is not required to do so, except in cases
14 where two or more opinions are equally well-supported and consistent with the
15 record. *Id.*

16 Supportability and consistency are further explained in the regulations:

17 (1) *Supportability.*

18 The more relevant the objective medical evidence and supporting
19 explanations presented by a medical source are to support his or her medical
20 opinion(s) or prior administrative medical finding(s), the more persuasive
the medical opinions or prior administrative medical finding(s) will be.

21 (2) *Consistency.*

22 The more consistent a medical opinion(s) or prior administrative medical
23 finding(s) is with the evidence from other medical sources and nonmedical
24 sources in the claim, the more persuasive the medical opinion(s) or prior
administered medical finding(s) will be.

25 *Id.* §§ 404.1520c(c); 416.920c(c).

26 i. Dr. *Lilagan*

27 On July 18, 2019, Dr. Lilagan completed a Physical Function Evaluation for
28 the Washington State Department of Social and Health Services (DSHS). Dr.

1 Lilagan concluded that Plaintiff was eligible for sedentary work function
 2 restrictions. Dr. Lilagan considered that Plaintiff (1) suffers from schwannoma of
 3 the right cervical spine at C5, resulting in symptoms of pain on the right side of the
 4 neck, pain of the right upper extremity, reduced range of motion of the neck, and
 5 dizziness; (2) has neck pain and right upper extremity pain from schwannoma
 6 results in moderate limitations in lifting, carrying, handling, pushing, pulling,
 7 reaching, stooping, and crouching; and (3) has previously seen a neurologist and
 8 neurosurgeon and needs to be monitored for progression of his symptoms.

9 The ALJ found Dr. Lilagan's opinion unpersuasive because the evaluation
 10 was part of a checkbox form and the exam revealed "few physical abnormalities"
 11 besides Plaintiff's claimed disabilities pertaining to his limited range of the neck,
 12 tenderness in the spine, and issues with right hand grip strength. AR 26. The ALJ
 13 also noted that the opinion was inconsistent with parts of the medical record that
 14 indicated Plaintiff has a normal gait, no difficulty with balance, and no more than
 15 routine monitoring of the schwannoma.

16 Here, the ALJ did not adequately explain why Dr. Lilagan's opinion was
 17 unsupported or inconsistent with the record. Checkbox forms are not fatal to a
 18 functional evaluation. *See Garrison v. Colvin*, 759 F.3d 995, 1013 (9th Cir. 2014).
 19 More crucially, the abnormalities noted by Dr. Lilagan support Plaintiff's purported
 20 symptoms, which are pain in the right side of the neck, upper extremity, reduced
 21 range of motion in the neck, dizziness, and difficulty gripping with his right hand.
 22 Plaintiff did not report issues with his gait or balance, or claim the schwannoma
 23 needs more than routine monitoring. Those issues are irrelevant to Plaintiff's
 24 disability claim and do not support a finding that Dr. Lilagan's opinion is
 25 unsupported or inconsistent. The ALJ's evaluation of this opinion was not supported
 26 by substantial evidence.

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ii. Dr. Morgan and Dr. Lewis

On July 11, 2019, Dr. Morgan completed a Psychological/Psychiatric Evaluation for the DSHS regarding Plaintiff's anxiety and panic attacks. He noted marked limitations in Plaintiff's ability to: (1) perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances without special supervision; (2) adapt to changes in a routine work setting; (3) communicate and perform effectively in a work setting; (4) maintain appropriate behavior in a work setting; (5) complete a normal work day and work week without interruptions from psychologically-based symptoms; and (6) set realistic goals and plan independently.

11 The ALJ found the opinion evidence of Dr. Morgan unpersuasive. The ALJ
12 reasoned, in part, that the opinion is irrelevant because it was for the purpose of
13 assessing DSHS criteria for disability. The ALJ found that the checkbox form
14 similarly discounted the opinion's value, and the opinion was inconsistent with other
15 medical records that showed Plaintiff had normal mental health examinations.

On July 13, 2019, Dr. Lewis also reviewed Plaintiff's medical reports and found Plaintiff (1) is limited to sedentary work; (2) is markedly limited in the same six work activities opined on by Dr. Morgan; (3) suffers marked symptoms of panic attacks; and (4) suffers moderate symptoms from schwannoma of the cervical spine.

20 The ALJ concluded the opinion of Dr. Lewis was unpersuasive because it
21 mirrored Dr. Morgan's opinion.

In this case, the ALJ erred in discounting Dr. Morgan's and Dr. Lewis' medical opinions. The ALJ claimed the opinions were irrelevant because they were part of Plaintiff's disability evaluation under state law. This assertion does not provide adequate reasoning as to how the opinions are or are not consistent or supported by the medical evidence, as required by 20 C.F.R. §§ 404.1520c(c) and 416.920c(c). And as noted above, an opinion given through a checkbox form is not dispositive to its persuasiveness. *See Garrison*, 759 F.3d at 1013. The ALJ's findings

1 are not supported by substantial evidence because an improper legal standard was
2 applied in weighing the evidence. *Brawner*, 839 F.2d at 433. As discussed further
3 below, the longitude of the records indicate Plaintiff persistently presented with
4 anxiety, and thus, Dr. Morgan's and Dr. Lewis' opinions were not inconsistent with
5 the objective medical evidence.

6 B. Plaintiff's Subjective Complaints

7 Plaintiff argues the ALJ erred in discounting Plaintiff's subjective symptoms
8 of his physical and mental health conditions.

9 In determining whether a claimant's testimony regarding subjective pain or
10 symptoms is credible, the ALJ engages in a two-step analysis. *Garrison*, 759 F.3d at
11 1014. "First, the ALJ must determine whether the claimant has presented objective
12 medical evidence of an underlying impairment which could reasonably be expected
13 to produce the pain or other symptoms alleged." *Id.* (citation and quotation omitted).
14 If the claimant satisfies the first step of the analysis, and there is no evidence of
15 malingering, the ALJ can reject the claimant's testimony about the severity of their
16 symptoms "only by offering specific, clear and convincing reasons for doing so." *Id.*
17 (citation and quotation omitted). "This is not an easy requirement to meet: The clear
18 and convincing standard is the most demanding required in Social Security cases."
19 *Id.* (citation and quotation omitted). That said, if the ALJ's credibility finding is
20 supported by substantial evidence in the record, the Court may not engage in second-
21 guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002).

22 i. *Physical Conditions*

23 The ALJ determined that the objective medical evidence did not support the
24 level of physical limitations claimed by Plaintiff, and Plaintiff's subjective physical
25 complaints were "not entirely consistent with the medical evidence and other
26 evidence in the record." AR 23. The ALJ cited medical records that indicated
27 Plaintiff presented with normal posture, gait, and balance during examinations, and
28 his schwannoma was stable in size and did not require surgery. The ALJ considered

1 that Plaintiff testified to significant symptoms from his spinal tumor at the hearing,
2 but he relayed different symptoms to his neurologist, Christopher Hofstetter, MD,
3 during a visit on December 18, 2019. The ALJ opined that the fact Plaintiff's
4 symptoms stemming from the schwannoma have not required surgery suggested
5 they are not particularly debilitating. The ALJ also considered that Plaintiff
6 performed "high functioning activities of daily living," including caring for his dog,
7 painting, making his own meals, grocery shopping, and performing household
8 chores. AR 25.

9 The ALJ failed to provide clear and convincing reasons for rejecting
10 Plaintiff's testimony. The ALJ's citations to Plaintiff's functioning posture, gait, and
11 balance across certain records do not contradict Plaintiff's purported limitations. The
12 cited medical evidence is not inconsistent with Plaintiff's claimed limitations, which
13 pertain to use of his neck, back, and right hand. The ALJ erred by selectively
14 focusing on aspects of the medical record that tend to suggest non-disability, but that
15 are largely unrelated to Plaintiff's purported symptoms and disability. *See Edlund v.*
16 *Massanari*, 253 F.3d 1152, 1159 (9th Cir. 2001).

17 The ALJ also erred in finding that Plaintiff's statements about his symptoms
18 at the hearing "directly contradicted" a prior statement to his neurologist, Dr.
19 Hofstetter. AR 25. During the December 18, 2019 visit cited by the ALJ, Plaintiff
20 reported he had experienced "shooting pains into his right arm and hand" for the past
21 four years, hands shaking bilaterally, and neck discomfort when looking to the right.
22 AR 523. Plaintiff's statements to Dr. Hofstetter regarding his symptoms did not
23 contradict his testimony at the hearing.

24 In addition, the fact that Plaintiff has not been referred for surgery is not a
25 clear or convincing reason to discount his testimony. Plaintiff testified that he would
26 pursue surgery if he was experiencing a "constant shooting pain 24/7 . . . without
27 being let up[.]" AR 79. Plaintiff did not testify to experiencing unrelenting pain in
28 his neck, back, and hand, but rather testified that the shooting pain and pressure

1 arises from certain movements. When it arises, Plaintiff testified he can rest or
 2 recline his body for approximately 20 minutes to relieve symptoms. During
 3 Plaintiff's visit with Dr. Hofstetter, Dr. Hofstetter noted that surgery may be
 4 appropriate if Plaintiff developed "neurological symptoms or if there [was] growth
 5 of the lesion." AR 552. Plaintiff's testimony did not contradict his statements
 6 regarding when resection of the tumor may be appropriate or when the medical
 7 evidence dictates it may be necessary.

8 The ALJ further erred in concluding Plaintiff's physical functioning was
 9 greater than described because of his activities of daily living. "[T]he mere fact that
 10 a plaintiff has carried on certain daily activities, such as grocery shopping, driving a
 11 car, or limited walking for exercise, does not in any way detract from [his] credibility
 12 as to [his] overall disability." *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir.
 13 2001). The ALJ noted that some of Plaintiff's activities, like painting and making
 14 simple meals, indicated "greater physical functioning than described." AR 25. Yet,
 15 Plaintiff reported only being able to perform these activities in short intervals,
 16 typically 10 to 15 minutes in length, with a need to recline for up to 20 minutes at a
 17 time and throughout the day to relieve his symptoms. The daily activities described
 18 by Plaintiff do not detract from his credibility, and his claims do not demonstrate
 19 greater physical functioning than reported. Plaintiff's ability to perform some
 20 activities at his own pace with frequent opportunities to rest does not establish that
 21 he has the ability to work full-time on a consistent basis. The ALJ did not provide
 22 clear and convincing reasons to discount Plaintiff's testimony regarding his physical
 23 impairments.

24 *ii. Mental Health Conditions*

25 The ALJ concluded that the objective medical evidence did not support the
 26 level of limitation claimed for Plaintiff's mental impairments. The ALJ found
 27 Plaintiff's mental function related to his anxiety remained relatively stable except
 28 for periods of increased stressors. For instance, the ALJ noted Plaintiff's symptoms

1 of anxiety decreased around October 22, 2019, when he reported he was “doing
 2 well,” and clinical scores showed only mild depression and anxiety. AR 24. The ALJ
 3 considered that, during a visit on April 22, 2020, Plaintiff was “stable and doing
 4 well” and another visit on June 25, 2020, indicated “a normal mood and affect,
 5 normal behavior, normal psychomotor activity, normal speech, normal thought
 6 process, and normal cognitive functioning including normal attention/concentration,
 7 normal memory, and excellent fund of knowledge.” AR 24.

8 The Ninth Circuit directs that, when discussing mental health issues, “it is
 9 error to reject a claimant’s testimony merely because symptoms wax and wane in
 10 the course of treatment. Cycles of improvement and debilitating symptoms are a
 11 common occurrence, and in such circumstances it is error for an ALJ to pick out a
 12 few isolated instances of improvement over a period of months or years and to treat
 13 them as a basis for concluding a claimant is capable of working.” *Garrison*, 759 F.3d
 14 at 1017; *see also Holohan v. Massanari*, 246 F.3d 1195, 1205 (9th Cir. 2001) (“That
 15 a person who suffers from severe panic attacks, anxiety, and depression makes some
 16 improvement does not mean that the person’s impairments no longer seriously affect
 17 her ability to function in a workplace.”).

18 Here, the ALJ did not provide clear and convincing reasons to reject the
 19 severity of Plaintiff’s claimed symptoms. First, several reasons offered by the ALJ
 20 do not contradict Plaintiff’s claimed symptoms from anxiety; for example, Plaintiff
 21 did not claim his speech, memory, knowledge, or attention/concentration is affected
 22 by anxiety. Second, the ALJ cited select information that mischaracterizes the whole
 23 of the medical records. The Court cannot affirm by isolating a specific quantum of
 24 supporting evidence. *Revels*, 874 F.3d at 654. The record indicates Plaintiff has
 25 suffered from lifelong anxiety, including a number of hospitalizations for the
 26 condition. Throughout 2020 and early-2021, Plaintiff’s mental status exams
 27 consistently showed a sad/depressed and anxious mood, fearful/anxious affect, poor
 28 body image, and paranoia/suspiciousness. The medical records from 2019 through

1 early 2021 show that Plaintiff suffered from a consistent anxious mood and affect.
 2 The mere fact that Plaintiff's symptoms "waxed and waned" during late 2019 and
 3 mid-2020 is insufficient to support a finding that he does not suffer have work
 4 limitations due to his anxiety. *See Garrison*, 759 F.3d at 1017. The ALJ did not
 5 provide clear and convincing reasons to reject Plaintiff's complaints regarding his
 6 anxiety.

7 The Court finds the activities performed by Plaintiff and described to his
 8 doctors, on disability forms, and at the hearing, were consistent with his claimed
 9 conditions and the objective medical evidence. The ALJ failed to articulate clear and
 10 convincing reasons for discounting Plaintiff's symptoms and credibility, and the
 11 findings were unsupported by substantial evidence, based on the record as a whole.

12 C. Lay Witness Testimony

13 The ALJ assessed the lay witness testimony of Plaintiff's mother. The ALJ
 14 determined her statement largely mirrored Plaintiff's symptom allegations, and they
 15 were unconvincing for "substantially the same reasons" as Plaintiff's allegations. AR
 16 26. Plaintiff's mother similarly reported that Plaintiff's lower back pain makes being
 17 on his feet for more than 10 to 15 minutes "nearly impossible," that he is unable to
 18 sit for more than a short period of time, cannot lift more than a few pounds, and his
 19 anxiety prohibits him from being around groups of people. AR 364. She also claimed
 20 Plaintiff's anxiety causes panic attacks and sleeping issues.

21 An ALJ is permitted to discount a lay witness' testimony when it is
 22 substantially similar to the claimant's testimony and the ALJ has properly
 23 discounted the claimant's testimony. *See Valentine v. Comm'r Soc. Sec. Admin.*, 574
 24 F.3d 685, 694 (9th Cir. 2009). Since the ALJ relied on improper bases for dismissing
 25 Plaintiff's testimony, the ALJ erred in discounting Plaintiff's mother's testimony.

26 D. Step Five Burden

27 Plaintiff contends the ALJ failed to meet their step five burden, which requires
 28 that the ALJ demonstrate Plaintiff can perform work that exists in significant

1 numbers in the national economy.

2 The Court finds the ALJ failed to demonstrate Plaintiff can perform work that
3 exists in significant numbers in the national economy. The ALJ's RFC is not
4 supported by substantial evidence, because it fails to take into consideration the
5 medical opinion evidence and Plaintiff's and Plaintiff's mother's testimony.
6 Specifically, the ALJ erred by not considering that Plaintiff must lie down or recline
7 after every 10 to 15 minutes of work for approximately 20 minutes. When presented
8 with a conservative hypothetical of these symptoms, the VE testified that there is no
9 opportunity in competitive employment for a worker with these limitations. For
10 these reasons, the ALJ did not meet the step five burden.

11 **VIII. Conclusion**

12 The ALJ erred in failing to properly weigh and consider the medical opinion
13 evidence and Plaintiff's and Plaintiff's mother's testimony. The RFC failed to
14 account for Plaintiff's rest limitations which limits him to sedentary work; as such,
15 the ALJ's RFC assessment does not account for the full extent of Plaintiff's
16 functional limitation and cannot support the ALJ's disability determination. If the
17 ALJ incorporated these limitations in Plaintiff's RFC, the ALJ would be required to
18 find Plaintiff on remand. *See Harman v. Apfel*, 211 F.3d 1172, 1178–79 (9th Cir.
19 2000). Since it is clear from the record Plaintiff is unable to perform gainful
20 employment and no additional proceedings are necessary, remand for an award of
21 benefits is necessary. *See Benecke v. Barnhart*, 379 F.3d 587, 596 (9th Cir. 2004).

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1 Accordingly, **IT IS HEREBY ORDERED:**

2 1. For docket purposes, Plaintiff's Opening Brief, ECF No. 11, is

3 **GRANTED.**

4 2. For docket purposes, the Commissioner's Response Brief, ECF No. 13,

5 is **DENIED.**

6 3. The decision of the Commissioner is **REVERSED** and **REMANDED**

7 for an immediate award of benefits.

8 4. Judgment shall be entered in favor of Plaintiff and against Defendant.

9 **IT IS SO ORDERED.** The District Court Executive is hereby directed to file
10 this Order, provide copies to counsel, and **close** the file.

11 **DATED** this 18th day of May 2023.



15 Stanley A. Bastian

16 Stanley A. Bastian
17 Chief United States District Judge
18